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Hearing

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

13 Cr. 150 (NRB)

5 MAHAMADOU DAFPE,

6 Defendant.

7 -----x

8 November 7, 2013

9 9:55 a.m.

10 Before:

11 HON. NAOMI REICE BUCHWALD,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

BY: CAROLINA FORNOS

18 SARAH McCALLUM

Assistant United States Attorneys

19 LORI COHEN

Attorney for Defendant

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Hearing

1 (In open court)

2 (Case called)

3 MS. FORNOS: Good morning, your Honor. Carolina  
4 Fornos on behalf of the United States and with me is Sarah  
5 McCallum and also Special Agent Karen Flanagan from the IRS.

6 MS. COHEN: Good morning. Lori Cohen representing  
7 Mr. Daffe.

8 THE COURT: Can we just get started with the  
9 government's first witness, or is there something preliminary  
10 that we have to do.

11 MS. FORNOS: No, your Honor. There are a couple of  
12 other unrelated matters that we can certainly address after the  
13 hearing.

14 THE COURT: OK.

15 MS. FORNOS: The first is that there has been a  
16 superseding indictment issued in this case, and we would like  
17 to arraign the defendant on that superseding indictment. There  
18 was also a protective order that the government submitted to  
19 the Court for the Court's consideration. Both of those matters  
20 we can address after the hearing.

21 THE COURT: We can also do it right now before I  
22 forget. Over 60 I might forget.

23 Ms. Cohen, have you received a copy of the superseding  
24 indictment?

25 MS. COHEN: I have, your Honor.

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Hearing

1 THE COURT: Have you had a chance to review it with  
2 Mr. Daffe?

3 MS. COHEN: I have, your Honor.

4 THE COURT: Do you waive its public reading?

5 MS. COHEN: I do.

6 THE COURT: Mr. Daffe, how do you plead to the  
7 superseding indictment? Guilty or not guilty?

8 THE DEFENDANT: Not guilty.

9 THE COURT: OK. I will take a look at the protective  
10 order later.

11 MS. FORNOS: Yes, your Honor.

12 THE COURT: That is fine.

13 MS. FORNOS: Thank you.

14 It has been signed by Ms. Cohen and Mr. Daffe. Your  
15 Honor, before we proceed, we would also like to note for the  
16 record that the government will stipulate that it will not use  
17 the wallet or the contents of the wallet that were obtained  
18 from Mr. Daffe on January 31, 2013 in the government's case in  
19 chief. Accordingly, we have notified Ms. Cohen of that matter  
20 this morning, and we believe that that issue is moot. The  
21 suppression hearing should thus be limited to whether or not  
22 there was consent to the remaining items taken that day, which  
23 consist of two metal bins and the papers contained therein, a  
24 laptop computer, the contents, a standalone tower computer, and  
25 the iPhone.

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Hearing

1 THE COURT: All right.

2 MS. FORNOS: Just briefly, your Honor, the government  
3 has one witness. The government intends to call Special Agent  
4 Anthony Ragusa, and we expect that the testimony will  
5 demonstrate that there was lawful consent.

6 May we proceed?

7 THE COURT: Yes.

8 MS. FORNOS: The government calls Special Agent  
9 Anthony Ragusa.

10 ANTHONY RAGUSA,

11 called as a witness by the Government,  
12 having been duly sworn, testified as follows:

13 THE COURT: You may be seated.

14 MS. FORNOS: May I inquire, your Honor?

15 THE COURT: Yes.

16 DIRECT EXAMINATION

17 BY MS. FORNOS:

18 Q. Agent Ragusa, good morning.

19 A. Good morning.

20 Q. Could you please tell us where you are employed.

21 A. I am employed with the IRS, criminal investigation.

22 Q. What is your position with the IRS?

23 A. Special Agent.

24 Q. Could you generally describe your duties and  
25 responsibilities as a special agent.

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Ragusa - cross

1 A. To investigate financial crimes, mostly dealing in Title  
2 18, Title 26 and Title 31 of the United States Code.

3 Q. Generally what does that involve?

4 A. Title 18 would be, for example, money laundering; Title 26  
5 would be tax crimes; and Title 31 would be violations to the  
6 Bank Secrecy Act.

7 Q. How long have you been with the IRS?

8 A. Seven and a half years, total five years as a special  
9 agent.

10 Q. Before you joined the IRS, where were you employed?

11 A. With Ernst & Young in public accounting.

12 Q. How long were you at Ernst & Young?

13 A. About a year.

14 Q. Special Agent Ragusa, let me direct your attention to  
15 January 31, 2013. Were you working that day?

16 A. I was.

17 Q. What was your assignment that day?

18 A. I was the team leader of the arrest of Mr. Daffe.

19 Q. What does it mean to be the team leader?

20 A. You are in charge of the overall arrest and also the other  
21 agents involved.

22 Q. Did you, in fact, have an arrest warrant for Mr. Daffe that  
23 day?

24 A. I did.

25 Q. Did you execute that arrest warrant?

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Ragusa - cross

1 A. I did.

2 Q. Could you tell us what time approximately the arrest took  
3 place?

4 A. About 8:40 in the morning.

5 Q. Were you working alone?

6 A. No.

7 Q. How many people were with you?

8 A. Seven others.

9 Q. Can you please explain what's the first thing that happened  
10 with respect to the arrest that morning?

11 A. The first thing we did after we made the approach to the  
12 apartment door was I knocked and announced at the door saying  
13 we had an arrest warrant. Mr. Daffe opened the door. The  
14 agents made entry, and I proceeded to ask Mr. Daffe to take a  
15 seat while the agents made their way and conducted a security  
16 sweep of the apartment.

17 Q. Let's take a step back. When Mr. Daffe first opened the  
18 door, was he dressed?

19 A. It looked like he was awake, yeah, like he was up for a  
20 while.

21 MS. COHEN: Objection. That is not responsive.

22 THE COURT: I think the question was was he dressed.

23 A. Yes.

24 Q. Was he in his pajamas?

25 A. No, he was dressed.

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Ragusa - cross

1 Q. What, if anything, did you do after you made your way into  
2 the apartment?

3 A. Before the agents made their security sweep, I identified I  
4 was Special Agent Anthony Ragusa with the IRS criminal  
5 investigation and that we had an arrest warrant for Mr. Daffe.

6 Q. Did you get the sense that Mr. Daffe had been awake for  
7 some period of time?

8 A. I would say so.

9 Q. As opposed to you waking him up when you knocked on the  
10 door?

11 A. Correct.

12 Q. How large -- or can you describe the apartment?

13 A. It was a small, one-bedroom apartment. I would say no  
14 bigger than 700, 800 square feet.

15 Q. How many bedrooms?

16 A. One bedroom.

17 Q. What happened after you asked him to take a seat?

18 A. The agents conducted a security sweep. I showed Mr. Daffe  
19 the arrest warrant we had. I explained that he was under  
20 arrest for basically identify theft the warrant said.

21 Q. Do you see the defendant in the courtroom today?

22 A. I do.

23 Q. Can you point him out, please.

24 A. Right there.

25 MS. FORNOS: I would like the record to reflect that

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Ragusa - cross

1 Special Agent Ragusa has pointed to the defendant.

2 THE COURT: It may so reflect.

3 Q. Special Agent Ragusa, did you speak with Mr. Daffe?

4 A. I did.

5 Q. Did you perceive any language barriers with Mr. Daffe?

6 A. No.

7 Q. Any problems with him understanding English?

8 A. No.

9 Q. What was his demeanor like?

10 A. He seemed calm and cooperative.

11 Q. What happened? What's the next thing happened?

12 A. After I sat him down, I read him his Miranda rights. I  
13 asked him if he had -- after I read the Miranda rights to him,  
14 I asked if he had any weapons on him. He replied no, but just  
15 to be safe I asked him to stand up, and I patted him down for  
16 weapons to see if he had any on him, which he did not.

17 Q. What, if anything, happened after you read him his Miranda  
18 rights and patted him down?

19 A. Some of the agents brought to my attention that during the  
20 security sweep they had seen some financial documents or some  
21 documents in the corner of the living room in two metal bins.

22 Q. Were these out in the open or were they somewhere else?

23 A. Yes, they were in the open. They could be seen from where  
24 we were in the living room in the corner.

25 Q. Let me draw your attention to what's been marked as



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Ragusa - cross

1 Government Exhibits 4 and 5. Do you recognize Government  
2 Exhibits 4 and 5?

3 A. I do.

4 Q. What are they?

5 A. Those are the metal bins containing the documents in  
6 question.

7 Q. Just to be clear, where exactly were they?

8 A. They were in the corner of the living room kind of by where  
9 his desk was in the corner of the living room.

10 Q. In plain view?

11 A. Yes.

12 Q. What, if anything, happened after the agent notified you  
13 that there were these documents?

14 A. I asked what were the documents inside those metal bins, to  
15 which Mr. Daffe explained financial records, work documents.

16 Q. Did you ask anything else?

17 A. I did. I asked if it was OK if we looked through them.

18 Q. What, if anything, did Mr. Daffe say?

19 A. He replied that it was fine.

20 Q. Did he say, no, you can't look at them?

21 A. No.

22 Q. Did he object to you reviewing the documents?

23 A. No.

24 Q. Did you threaten him in any way?

25 A. No.

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Ragusa - cross

1 Q. What was your tone when you asked him if you could review  
2 these documents?

3 A. About the same tone as now.

4 Q. What was his demeanor like when you were having this  
5 conversation with Mr. Daffe?

6 A. He was calm and cooperative.

7 Q. When you were having this conversation with Mr. Daffe, was  
8 your gun drawn?

9 A. No.

10 Q. Was anybody yelling in the apartment?

11 A. No.

12 Q. How would you describe the atmosphere in the apartment?

13 A. It was full of agents and himself, but it was generally  
14 calm, no noise.

15 Q. Was Mr. Daffe handcuffed at the time?

16 A. No.

17 Q. What happened after you obtained consent to look at the  
18 documents?

19 A. I asked him if it was OK if we take the documents with us,  
20 to which he replied yes.

21 Q. Did he indicate, no, you couldn't take them?

22 A. No.

23 Q. So you obtained consent to seize the documents?

24 A. Right.

25 Q. Were there any other discussions regarding any other items?

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Ragusa - cross

1 A. Yes. It was also brought to my attention that there was a  
2 tower computer close by where the documents were as well as an  
3 iPhone and a MacBook on the coffee table.

4 Q. Let me draw your attention to what's been marked as  
5 Government Exhibit 4. Do you recognize that?

6 A. I do.

7 Q. What is it?

8 A. That's the computer tower that was taken that day.

9 MS. FORNOS: Your Honor, I would like to move to offer  
10 all of these items, Exhibits 4, 5 and 6 into evidence.

11 MS. COHEN: I have no objection, your Honor.

12 THE COURT: All right. I think either you misspoke or  
13 I misheard. Originally I thought you described the two metal  
14 bins as 4 and 5, but they're really 5 and 6.

15 MS. FORNOS: Yes, your Honor. I did misspeak. It's 5  
16 and 6 and the computer is 4.

17 THE COURT: OK. Exhibits 4, 5 and 6 are received.

18 (Government's Exhibits 4, 5 and 6 received in  
19 evidence)

20 BY MS. FORNOS:

21 Q. What discussions, if any, were had with respect to the  
22 computer tower?

23 A. I explained that -- well, first I asked if it was OK if we  
24 either looked through it or take it to the office to make a  
25 copy of it.

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Ragusa - cross

1 Q. What, if anything, did Mr. Daffe say?

2 A. He said that was fine.

3 Q. What was his demeanor when you were asking these questions?

4 A. He seemed calm, very cooperative.

5 Q. Did he ask you any questions?

6 A. No.

7 Q. What if anything happened after he said you could -- well,  
8 what exactly did Mr. Daffe say?

9 A. I first asked what was on the computer. He replied it was  
10 his work computer. So after that I asked him is it OK if we  
11 copy it or take it, which he replied we could.

12 Q. Were there any other items discussed?

13 A. We discussed the MacBook and his iPhone.

14 Q. What, if any, discussions did you have with respect to the  
15 iPhone and the MacBook?

16 A. The same as the computer, if it was OK if we take it with  
17 us.

18 Q. What, if anything, did he respond?

19 A. He replied it was OK.

20 Q. Was Mr. Daffe handcuffed during this discussion?

21 A. No. He was handcuffed only after we were exiting the  
22 apartment.

23 Q. How long would you say you were in the apartment?

24 A. I would say 35 minutes approximately.

25 THE COURT: I'm sorry. I just didn't hear. How long?

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Ragusa - cross

1 THE WITNESS: About 35 minutes.

2 Q. Did you at any point inspect the documents that are in the  
3 metal bins?

4 A. I did briefly.

5 Q. Do you think Mr. Daffe observed you looking at them?

6 A. I believe he did. Based on the size of the apartment and  
7 also the proximity to myself and Mr. Daffe, he must have seen  
8 what I was looking at.

9 Q. Did he at any point say, no, don't look at them?

10 A. No.

11 Q. What happened after -- did you transport Mr. Daffe  
12 anywhere?

13 A. I transported him along with another special agent to 290  
14 Broadway, which is our Manhattan main office for IRS criminal  
15 investigation.

16 Q. Why did you transport him there?

17 A. For standard processing, which would include completing  
18 U.S. Marshals forms, taking photos of Mr. Daffe, as well as  
19 fingerprinting him.

20 Q. While you were at 290 Broadway, did you provide Mr. Daffe  
21 with a consent to search form?

22 A. I did.

23 Q. If you could turn to what's been marked as Government  
24 Exhibit 1 that is in front of you.

25 A. OK.

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Ragusa - cross

1 Q. Can you take a moment and look at that document, please.

2 Do you recognize that document?

3 A. I do.

4 Q. What is it?

5 A. It is the voluntary consent to a search of person,  
6 premises, or conveyance form.

7 Q. How do you recognize that document?

8 A. My signature and date is at the bottom.

9 MS. FORNOS: Your Honor, we offer Exhibit 1 into  
10 evidence.

11 MS. COHEN: No objection, your Honor.

12 THE COURT: Received.

13 (Government's Exhibit 1 received in evidence)

14 Q. Special Agent Ragusa, what, if anything, did you say --  
15 what did you do with this form?

16 A. I don't remember if we read it to Mr. Daffe verbatim, but  
17 we did explain it to him at the very least and had him date and  
18 sign it and we asked him if he understood it, to which he  
19 replied yes.

20 Q. Did he ask you any questions?

21 A. No.

22 Q. Did he sign the document?

23 A. He did.

24 Q. At approximately what time did he sign the document?

25 A. 10:40 in the morning.

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Ragusa - cross

1 Q. What was his demeanor like when he was signing this  
2 document?

3 A. He appeared calm.

4 Q. Did he ask you any questions?

5 A. No.

6 Q. Is there a reason that you didn't get his written consent  
7 while you were in the apartment?

8 A. Either we didn't have the form available at the time or we  
9 generally in arrests try to make entry and exit as quick as  
10 possible, which could be the reason why we didn't do it at the  
11 apartment.

12 Q. Is there any IRS policy requiring you to obtain consent --

13 MS. COHEN: Objection.

14 Q. -- in written form?

15 THE COURT: Overruled.

16 A. No.

17 Q. What, if anything, happening after Mr. Daffe signed the  
18 consent form?

19 A. We processed him, as I mentioned before, and also we asked  
20 if we could interview him.

21 Q. If you could turn your attention to what's been marked as  
22 Government Exhibit 2. Please take a moment to take a look at  
23 that. Do you recognize this document?

24 A. I do.

25 Q. How do you recognize this document?

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Ragusa - cross

1 A. My name and signature are at the bottom.

2 Q. You, in fact, signed this document?

3 A. I did.

4 MS. FORNOS: Your Honor, we offer Exhibit 2 into  
5 evidence?

6 MS. COHEN: No objection.

7 THE COURT: Received.

8 (Government's Exhibit 2 received in evidence)

9 Q. Did you, in fact, hand this document to Mr. Daffe?

10 A. I did.

11 Q. Was it you or someone else?

12 A. It might have been another special agent, but we did  
13 explain it to him. I don't know if we read it to him verbatim.  
14 We probably did this one, but he said he understood.

15 Q. Did he ask you any questions?

16 A. No.

17 Q. Did he sign this document?

18 A. He did.

19 Q. Did he sign it in your presence?

20 A. Yes.

21 Q. What was his demeanor when he signed this document?

22 A. Again, calm and cooperative.

23 Q. Did he, in fact, provide statements to you?

24 A. Yes.

25 Q. How long did you interview him for?



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Ragusa - cross

1 A. Approximately an hour.

2 Q. At any time during that interview did he say he did not  
3 want to continue the interview?

4 A. I don't remember.

5 MS. FORNOS: Your Honor, I don't have any further  
6 questions.

7 MS. COHEN: May I inquire?

8 THE COURT: Ms. Cohen.

9 MS. COHEN: Thank you.

10 CROSS EXAMINATION

11 BY MS. COHEN:

12 Q. Good morning, Agent.

13 A. Good morning.

14 Q. When you arrived at the location and Mr. Daffe opened the  
15 door, what was he wearing?

16 A. I don't remember. It wasn't pajamas and it wasn't like how  
17 we are, but I remember he was dressed.

18 Q. You remember he was dressed?

19 A. Yes.

20 Q. But you don't remember what he was wearing?

21 A. Not exactly, no.

22 Q. When you say not exactly, do you have a vague memory, or is  
23 it that you don't remember?

24 A. I don't remember.

25 Q. When you came into the apartment, how many agents were with

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Ragusa - cross

1 you?

2 A. I believe, including myself, six agents made entry.

3 Q. You were the person who spoke to Mr. Daffe?

4 A. Yes.

5 Q. What did the other agents do?

6 A. The other agents were conducting a security sweep to make  
7 sure there was no other individuals in the apartment.

8 Q. So you described this apartment as approximately 700 square  
9 feet, correct?

10 A. Yeah, it was small.

11 Q. Consisting of a living room and a bedroom and a kitchen?

12 A. Yeah. And small living room, small kitchen, yeah.

13 Q. The other six agents were searching through the apartment  
14 to determine what?

15 MS. FORNOS: Objection, your Honor.

16 THE COURT: You can answer that.

17 A. During arrests we search for individuals.

18 Q. Is that it, just individuals?

19 A. During arrest warrant, yes, and well, weapons in plain view  
20 and things like that.

21 Q. When you say things like that, what else would you be  
22 looking for?

23 A. Just things in plain view that -- they wouldn't be out in  
24 the open -- it wouldn't be like how you conduct a search  
25 warrant.

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Ragusa - cross

1 Q. When you spoke to Mr. Daffe, where did you do that?

2 A. Right outside his kitchen.

3 Q. Was he seated? Was he standing?

4 A. At first he was seated, then after that he too stood up and  
5 then he -- it varied.

6 Q. When you told him that you were there to arrest him, you  
7 handed him the arrest warrant, correct?

8 A. I did.

9 Q. You told him basically what you were arresting him for,  
10 correct?

11 A. Yes.

12 Q. How soon after that did someone say to you something about  
13 the papers in the bin?

14 A. I don't remember exactly.

15 Q. Was that the first thing that was brought to your  
16 attention?

17 A. No. The first thing that was brought to my attention was  
18 that there were no other people in the apartment.

19 Q. Who told you that?

20 A. I don't remember exactly who. One of the other agents told  
21 me.

22 Q. Did one of these other agents also bring to your attention  
23 the papers in the bin?

24 A. They did.

25 Q. When you say papers in the bin, they appear similar to how

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Ragusa - cross

1 they are here in court, correct?

2 A. Yes.

3 Q. The documents themselves are in envelopes, correct?

4 A. Right.

5 Q. So when you first looked at the bin, there were no  
6 financial records in plain view, were there?

7 A. I believe some were.

8 Q. Some were in this bin? You were able to see in plain view  
9 financial records?

10 A. I personally, no, but the other agents did.

11 Q. You personally, when you looked, did you see any financial  
12 records?

13 A. When I looked, yes.

14 Q. When you looked into the items in the bin, correct?

15 A. Yes.

16 THE COURT: Can we just clarify what he's really  
17 testifying about. There seemed to be potentially two stages  
18 here. The first when some other agent brings to his attention  
19 the existence of these two bins with documents, and then  
20 potentially -- let me ask the simple question, I guess.

21 Agent Ragusa, did you look at any of the documents in  
22 the bin before, according to your testimony, Mr. Daffe gave you  
23 permission to do so?

24 THE WITNESS: No.

25 THE COURT: OK.

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Ragusa - cross

1 Q. When you first looked at the bin, meaning when you first  
2 saw it?

3 A. OK.

4 Q. Your attention was pointed to it by another agent, correct?

5 A. Right.

6 Q. The other agent said to you what?

7 A. There's two metal bins in the corner of the room by his  
8 computer that look like financial documents.

9 Q. So another agent said to you that he or she thought that  
10 there were financial records in the bin, correct?

11 A. Correct.

12 Q. They thought that there were financial records in the bin  
13 because they had seen them, correct?

14 MS. FORNOS: Objection.

15 MS. COHEN: Should I rephrase it, your Honor?

16 THE COURT: I don't think that's a question that he  
17 can possibly answer because you're asking for the operation of  
18 some agent's mind.

19 Q. What was it that you were told by the agent who first saw  
20 the documents in the bin?

21 A. That there were two metal bins in the corner by his work  
22 space, by the desk, that there were two metal bins containing  
23 financial documents.

24 Q. So you were informed by the agent that the bin contained  
25 financial documents?

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Ragusa - cross

1 A. Correct.

2 Q. When you then looked over to the bin, what did you see?

3 A. I saw -- well, I was still by Mr. Daffe. I could see the  
4 metal bins in the corner. At that point I asked what were in  
5 those bins.

6 Q. You asked Mr. Daffe?

7 A. Right.

8 Q. What did he reply?

9 A. He replied financial papers, work documents.

10 Q. You said to him what?

11 A. Is it OK if I look through them.

12 Q. And he said?

13 A. That was fine.

14 Q. Those were his words? That was fine?

15 A. Not exactly, but he gave me the OK, that I could look  
16 through them.

17 Q. Do you remember what his exact words were?

18 A. Not precisely, no.

19 Q. When you asked this question and he gave this response,  
20 where were the other agents in the room?

21 A. I don't remember exactly, but they weren't searching for  
22 anything. They were standing around throughout the apartment.

23 Q. Do you know from your own knowledge whether the agent who  
24 informed you about these bins had looked in through the  
25 documents?

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Ragusa - cross

1 A. Can you repeat that one more time?

2 Q. Sure. Do you know from your own personal knowledge whether  
3 the agent who drew your attention to the bins had actually  
4 looked through the items in the bin?

5 A. I don't know if they had looked through them already.

6 Q. You don't know?

7 A. No.

8 THE COURT: Did you see any other agent actually  
9 looking through in some depth the documents before you asked  
10 Mr. Daffe if it would be OK for you to look at them?

11 THE WITNESS: No. They just pointed them out to me.

12 Q. Were you watching that, Agent?

13 A. I was more focused on Mr. Daffe.

14 Q. The items, when you approached the two bins and you looked  
15 into them, the financial records are in envelopes, correct?

16 A. Correct.

17 Q. It would be fair to say, would it not, Agent, that you  
18 can't remember what it is exactly that Mr. Daffe told you in  
19 relation to the bins?

20 A. Well, even if they were in envelopes, I could tell from  
21 what was on the envelopes that they were financial records  
22 based on my experience.

23 Q. What was that? What information was on the envelopes that  
24 made you think they were financial records?

25 A. Some actually said IRS, some were from banks.

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Ragusa - cross

1 Q. Some were bank statements?

2 A. Could have been.

3 Q. When you say they were from banks, what do you mean?

4 A. Well, at that point I had not opened them to examine them,  
5 but I know they were from banks.

6 Q. So they were correspondence from banks?

7 A. Yes.

8 Q. They were correspondence in an envelope that had a bank  
9 name on it?

10 A. Right.

11 Q. If there was something different, please let me know. Why  
12 don't you tell me what they were.

13 MS. FORNOS: Your Honor, can we get a clarification  
14 here, the time frame. Is this after consent or is this before?  
15 I just want the record to be clear as to when his memory is of  
16 what these documents were.

17 MS. COHEN: I will clarify, your Honor.

18 THE COURT: OK. You can try.

19 MS. COHEN: If the Court would rather.

20 THE COURT: I was just going to say did you physically  
21 approach the files and look at them yourself at any time before  
22 you asked Mr. Daffe for permission to do so?

23 THE WITNESS: No.

24 Q. Do you know if anybody else did, any of the other agents in  
25 the room had?



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Ragusa - cross

1 A. I don't know that.

2 Q. How long after you reviewed the items in the bin were you  
3 then alerted to the computers?

4 A. I would say a few moments after.

5 Q. What was told to you?

6 A. That there was also a computer next to the where the  
7 documents were, the desk.

8 Q. And was the computer on or off?

9 A. I don't remember.

10 Q. Did you ever see Mr. Daffe near the computer?

11 A. No.

12 Q. You were sort of talking to him the entire time?

13 A. I was with Mr. Daffe, yeah, in control, yes.

14 Q. Once you were told about the computers, what did you do?

15 A. I asked what were on the computers or that computer  
16 specifically.

17 Q. The tower?

18 A. Yeah, at that point, yeah.

19 Q. What did he say?

20 A. He said it was his work computer.

21 Q. What did you say?

22 A. I said do you mind if -- well, is it OK if we either review  
23 it here or we take it with us to be copied.

24 Q. Did you tell him at any point that any of those items could  
25 be used in a case against him?

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Ragusa - cross

1 MS. FORNOS: Objection, your Honor.

2 THE COURT: You can answer that.

3 A. We had read him his Miranda rights. Well, his consent was  
4 asked for, so I believe he was aware.

5 Q. That still wasn't an answer to my question. Did you ever  
6 advise him the reason why you wanted to take these things?

7 MS. FORNOS: Objection, your Honor.

8 THE COURT: Well, I think as a matter of law it is  
9 irrelevant.

10 Q. When you first read Mr. Daffe his rights, what did you read  
11 them from?

12 A. I have a card in my wallet that is standard that we read to  
13 arrestees.

14 Q. Did you have with you other documents that you might need  
15 that day?

16 A. The arrest warrant.

17 Q. Medical forms?

18 A. No.

19 Q. Consent forms?

20 A. We might have, but not that the -- I don't remember asking  
21 about those.

22 Q. Well, there is a form you use to acquire consent to search,  
23 correct?

24 A. Right.

25 Q. In fact, you had Mr. Daffe sign one of those, correct?

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Ragusa - cross

1 A. Correct, at 290 Broadway.

2 Q. Two hours after you left his apartment, correct?

3 A. Correct.

4 Q. Why didn't you have him sign that form at the apartment?

5 A. Like I said before, we were trying to -- generally in  
6 arrests we try to make entry and leave in as short a period as  
7 possible. And that's why -- also I probably didn't have the  
8 form available, to be honest. I didn't have it.

9 Q. So you didn't have the form that day?

10 A. I don't remember having that form with me at that time.

11 Q. Do you know whether you did or didn't?

12 A. Personally I did not.

13 Q. Do you know if any of the six other agents with you had the  
14 form?

15 A. I do not remember.

16 Q. Did you ask them that day, that morning in the apartment,  
17 does anybody have a consent form?

18 A. In the apartment, no.

19 Q. You indicated that it was relatively calm in the apartment,  
20 correct?

21 A. Yes.

22 Q. There was no yelling I think you testified?

23 A. Correct.

24 Q. Why did you have Mr. Daffe sign the consent form two hours  
25 later?

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Ragusa - cross

1 A. It's just it would be stronger in court to have a written  
2 document showing what items we had taken and also that he  
3 understood what we had taken and also his rights.

4 Q. So you had him sign that two hours after you took the  
5 items?

6 A. Right. But I wouldn't have left the apartment without  
7 getting first verbal consent.

8 MS. COHEN: Nothing further, your Honor.

9 MS. FORNOS: Your Honor, can I have a moment.

10 (Pause)

11 MS. FORNOS: No further questions, your Honor.

12 THE COURT: Agent Ragusa, if you had asked Mr. Daffe  
13 for consent to look at his files and take his computer and he  
14 had said no, what would the standard procedure have been at  
15 that time?

16 THE WITNESS: That would be it. We wouldn't pursue  
17 the items any further.

18 THE COURT: Would you have done anything else? Would  
19 you just have walked away and said, he won't give me consent,  
20 therefore, that's it?

21 THE WITNESS: As a team leader I wouldn't have pursued  
22 it any further because we only had an arrest warrant.

23 THE COURT: OK. I understand.

24 So you would have left the apartment and left the  
25 items in the apartment?

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Ragusa - cross

1 THE WITNESS: Correct.

2 THE COURT: Would you have done anything to keep them  
3 safe?

4 THE WITNESS: At that point I would have just  
5 proceeded with the arrest of Mr. Daffe. I wouldn't really  
6 worry about the items.

7 THE COURT: After you arrest a defendant, you I assume  
8 inform the assistant U.S. attorney working on the case?

9 THE DEFENDANT: Yes.

10 THE COURT: Would you have done that -- let me go back  
11 a step.

12 Were you interested in looking at these documents and  
13 the computer because you thought that they might contain  
14 evidence of the case that you were prosecuting against  
15 Mr. Daffe?

16 THE WITNESS: Yes.

17 THE COURT: So when you informed the assistant, would  
18 have informed the assistant U.S. attorney of the arrest, would  
19 you have mentioned the documents and the computer?

20 THE WITNESS: Not specifically. It depends on what  
21 time. Maybe at 290 when we were processing I would have been  
22 more specific as to what we actually took.

23 THE COURT: No. This is a hypothetical.

24 THE WITNESS: OK.

25 THE COURT: The hypothetical is that you are in the

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Ragusa - cross

1 apartment, you ask Mr. Daffe for permission to look at the  
2 documents and to take them, and he says get lost.

3 THE WITNESS: OK.

4 THE COURT: I'm trying to find out from you in the  
5 normal course what would you have done thereafter if you had  
6 concluded that the documents and the computer would have  
7 contained evidence helpful to you in the prosecution of  
8 Mr. Daffe?

9 THE WITNESS: First, it wasn't my case. But had it  
10 been my case and I was informed of that, I would have said just  
11 go ahead with the arrest, but also probably tried to obtain a  
12 search warrant.

13 MS. FORNOS: Your Honor, may I just clarify for the  
14 record.

15 REDIRECT EXAMINATION

16 BY MS. FORNOS:

17 Q. Special Agent Ragusa, are you the case agent on this case?

18 A. No.

19 THE COURT: I think maybe that explains the lack of  
20 enthusiasm.

21 THE WITNESS: Yeah.

22 Q. Who was the case agent on this case?

23 A. Special Agent Flanagan.

24 MS. FORNOS: Your Honor, may I please, there is a  
25 couple things I want to clarify for the record.

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Ragusa - redirect

1 THE COURT: Sure. OK.

2 Q. Special Agent Flanagan is the agent on the case. Was she  
3 before that day?

4 A. No.

5 Q. Just so that the record is clear, when you were told that  
6 there were bins with documents, what's the very next thing that  
7 happened? What did you say to Mr. Daffe?

8 A. I asked Mr. Daffe what were in those bins.

9 Q. What did Daffe say?

10 A. He replied they were financial documents and work  
11 documents.

12 Q. What did you do after that?

13 A. I asked him if it was OK if we looked through them.

14 Q. What did Mr. Daffe respond?

15 A. He replied it was OK.

16 Q. Did he in any way, shape, or form object to you looking  
17 through those documents?

18 A. No.

19 Q. You obtained his consent?

20 A. I did.

21 Q. Just to be clear, did you obtain his consent for the metal  
22 bins?

23 A. Yes.

24 Q. For the computer?

25 A. Yes.

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Ragusa - redirect

1 Q. The tower?

2 A. Yes.

3 Q. The MacBook?

4 A. Correct.

5 Q. And the iPhone?

6 A. Yes.

7 Q. Would you have taken any of those items or instructed  
8 anybody in your team to take those items if you had not  
9 obtained consent?

10 A. I would not have.

11 MS. FORNOS: No further questions, your Honor.

12 THE COURT: Ms. Cohen?

13 MS. COHEN: No questions, your Honor.

14 THE COURT: All right.

15 You are excused.

16 THE WITNESS: Thank you.

17 (Witness excused)

18 THE COURT: Does the government have any further  
19 witnesses?

20 MS. FORNOS: No, your Honor. We are prepared to rest.

21 THE COURT: Ms. Cohen?

22 MS. COHEN: Your Honor, the defense will not call any  
23 witnesses.

24 THE COURT: Do you want to make some closing  
25 arguments?



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1 MS. FORNOS: Certainly, your Honor. We are prepared  
2 to do that, unless the Court would like briefing, but we are  
3 prepared to proceed.

4 THE COURT: I think it is a factual credibility issue.  
5 I don't think there is a legal issue.

6 Of course there is a legal issue, but I think you both  
7 agree as to the what the law is, and I don't disagree with you.

8 MS. FORNOS: Thank you, your Honor. In that case we  
9 will go briefly just do some closing arguments.

10 It is well established, your Honor. We all know the  
11 standard. The Fourth Amendment does protect against  
12 unreasonable seizures. An exception to any Fourth Amendment  
13 violation is obtaining consent, and it is well established that  
14 consent must be voluntary, by a person who has authority to  
15 provide that consent.

16 In this particular case, Mr. Daffe is that person.  
17 The evidence here has established that he most certainly  
18 provided consent. The standard for consent is whether it was  
19 voluntary. The evidence here has demonstrated that it was  
20 voluntary. The agent specifically inquired as to every single  
21 item that they had seen in plain view. Mr. Daffe was  
22 specifically asked whether they could look through the items,  
23 or take those items, and Mr. Daffe said yes.

24 Special Agent Ragusa credibly testified that he  
25 absolutely obtained consent for every single item that the

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1 defense presently seeks to suppress, namely, the tower  
2 computer, the two metal bins with documents contained therein,  
3 the iPhone, and the MacBook.

4 The totality of circumstances is what the Court has to  
5 address, and in this particular case, Special Agent Ragusa  
6 credibly testified that Mr. Daffe was calm, he understood what  
7 was being asked, there was not a language barrier, he did not  
8 ask any questions, he was read his Miranda rights.

9 Mr. Daffe explained what was in the metal bins. As  
10 Special Agent Ragusa credibly testified, he specifically asked  
11 Mr. Daffe for consent and Mr. Daffe provided that consent.

12 Under the totality of circumstances, there was no  
13 coercion. Special Agent Ragusa credibly testified that there  
14 was absolutely no yelling, guns were not drawn, there was no  
15 threats or any intimidation.

16 Mr. Daffe not only provided oral consent multiple  
17 times during the arrest, but he thereafter provided written  
18 consent. At no point during this entire morning of January 31,  
19 2013, did Mr. Daffe withdraw that consent.

20 It is also well established, your Honor, as a matter  
21 of law that agents need not inform an arrestee that he has the  
22 right to refuse consent. That is well established.

23 The fact that Special Agent Ragusa did not advise  
24 Mr. Daffe is completely not relevant. Rather, what we know and  
25 what the evidence has credibly demonstrated is that the Miranda

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1 warnings were given to him not only once in the apartment, but  
2 a second time when he was being processed at 290 Broadway.

3 We would also note, your Honor, that the law is very  
4 well established that consent need not be in writing. Consent  
5 can be express, consent can be implied, and certainly the  
6 express can be oral or it can be written.

7 The key issue here is was it voluntary under a  
8 totality of circumstances analysis. The government submits  
9 that it was most certainly voluntarily provided, not once, but  
10 twice when he signed the consent later on, during the  
11 processing and that's submitted into evidence as Exhibit 1.

12 Accordingly, your Honor, the government respectfully  
13 requests that the Court deny the motion to suppress the  
14 specific items at issue, the documents contained in the metal  
15 bin, the tower, the MacBook computer, and the iPhone.

16 THE COURT: Ms. Cohen.

17 MS. COHEN: Yes, your Honor.

18 The law is clear in this area that the government has  
19 the burden of proving the consent by a preponderance of the  
20 evidence. The consent must not just be voluntary. It has to  
21 be unequivocal and intelligent.

22 In this case, the Court should look at the totality of  
23 the circumstances. A knock on your door at 8 o'clock in the  
24 morning and seven agents come into your apartment indicating  
25 that you are now under arrest for a federal offense.

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1           Mr. Daffe spoke with Agent Ragusa, who told the Court  
2 honestly that another agent had indeed looked at the items in  
3 the bin.

4           I think the Court itself can look at the bin as it  
5 sits here. You can't distinguish what kind of documents are in  
6 the bin. So it's clear that, prior to consent, some type of  
7 review of those documents had taken place. Whether it was  
8 cursory or whether it was more in depth we don't know, because  
9 it wasn't done by this agent. But this agent testified clearly  
10 that he had been told by another agent that there were  
11 financial documents in those bins prior to asking for consent.

12           So I would submit, your Honor, that there was in fact  
13 a search of those bins and the documents, or at least a cursory  
14 review of the documents in those bins prior to any consent  
15 being sought or given by Mr. Daffe as to the items in those  
16 bins.

17           I would submit that seven agents in a 700-square-foot  
18 New York City one-bedroom apartment after you have been read  
19 your rights and served with an arrest warrant, they don't have  
20 to have their guns out for a person to feel somewhat  
21 intimidated.

22           I also think it is somewhat notable that two hours  
23 after the items were taken the government agents sought  
24 Mr. Daffe's retroactive consent. I don't think the government  
25 has sustained its burden of proving that the consent was freely

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1 given and intelligent. There's no indication that they --  
2 although, again, the law doesn't specify they have to, but it  
3 does specify he has to know what he's consenting to, and I  
4 don't think the government has sustained that burden.

5 MS. FORNOS: Your Honor, may I be heard?

6 THE COURT: Yes.

7 MS. FORNOS: Briefly. We certainly object to any  
8 characterization of the written consent as a retroactive  
9 consent. Consent is consent. The question is whether it was  
10 voluntarily provided at the apartment.

11 The fact that he later signed the written consent does  
12 nothing but reiterate that the same consent was again provided  
13 and at no point was consent withdrawn.

14 With respect to the assertion that another agent must  
15 have reviewed the documents to determine that they were  
16 financial, we object to that, your Honor.

17 What the testimony was, Special Agent Ragusa was  
18 focused on Mr. Daffe. When he was notified that there were  
19 financial documents -- and the Court can look at the bins. The  
20 testimony was that it was by the computers. The Court can look  
21 at this, and it is reasonable for someone to infer that they  
22 are financial documents.

23 Special Agent Ragusa testified, credibly testified  
24 that he specifically asked Mr. Daffe what were in the bins.  
25 It's Mr. Daffe who said financial documents.

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1           Following that question, Special Agent Ragusa  
2 specifically asked, Can we look through those documents? And  
3 Mr. Daffe consented.

4           That consent, your Honor, is voluntary. If we were to  
5 adopt the position that any time agents walk into an apartment  
6 to arrest an individual in the morning necessarily means that  
7 it is a coercive environment such that no consent could ever be  
8 given, that's just simply not the law, your Honor.

9           If that were the case, then no consent could ever be  
10 voluntary when agents walk into an apartment to arrest an  
11 individual. And that's simply not the case here based on the  
12 totality of the circumstances.

13           THE COURT: All right. As I stated earlier, it is  
14 common ground that consent is an exception to the Fourth  
15 Amendment's prohibition on unreasonable searches and seizures.

16           In this context, I find that Agent Ragusa was a  
17 credible witness, and I accept his statement that he asked  
18 Mr. Daffe for permission to examine and to remove the files and  
19 the computer tower that have been marked in evidence this  
20 morning.

21           Agent Ragusa did not exaggerate his testimony.  
22 Indeed, his credibility was underscored by his responses to my  
23 questioning about what he would have done had Mr. Daffe said  
24 no. It was quite clear that this witness was simply not  
25 invested in the case and was simply, based on those answers,

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1 not motivated to invent a consent that didn't occur.

2           Moreover, Mr. Daffe never withdrew his consent. He  
3 signed the consent form, Exhibit 1, later. He didn't put any  
4 objections on it. As a footnote I observe that there was no  
5 legal requirement that he be informed how the documents or  
6 computers seized could be used against him.

7           Finally, to accept the defendant's argument that the  
8 presence of agents conducting an arrest creates an intimidating  
9 atmosphere would really invalidate virtually any consent to  
10 search. That is not the law. It has to be more than the  
11 inevitable atmosphere that comes from the fact of an arrest.  
12 And here indeed there is an absence of some of the more  
13 intimidating possibilities: No guns drawn, handcuffs not on  
14 the defendant when he gave consent, and I assume a group of  
15 agents that did not look like street crime detectives, who  
16 themselves can be actually very scary.

17           So the motion to suppress is denied.

18           Can I ask a question. What is the difference between  
19 the superseding indictment and the original?

20           MS. FORNOS: It is the exact same charges, your Honor,  
21 but to be clear, it's the government's position that there's  
22 actually two different types of tax fraud that were conducted  
23 by Mr. Daffe.

24           On the one hand, it's the government's position that  
25 Mr. Daffe was obtaining refunds based on fraudulent returns

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1 with false W-2s. That's what he was doing with other  
2 individuals and himself.

3 A separate tax fraud, still tax fraud, is offering to  
4 add dependents to his clients. These are real taxpayers who  
5 are filing real W-2s, but they are getting an additional  
6 deduction and credit by adding a dependent on their tax return.

7 So each of the counts are the exact same as before,  
8 but rather than having one 371 count, we now have two 371  
9 counts, one for conspiracy to obtain those fraudulent refunds  
10 that are stolen identities and false W-2s, a second 371 count  
11 that is conspiring and aiding and abetting the theft of the  
12 government funds by enabling a real person with an identity and  
13 real job and a W-2 and having an extra dependent put on that  
14 tax return.

15 So to avoid any confusion of multiple objects, we  
16 thought it best to clarify those two different types of tax  
17 fraud. Thus the 371 count was split into two, the 641 count  
18 was split into two, and the 286 count was split into two.

19 That's really the difference in the superseding  
20 indictment.

21 THE COURT: More structural rather than substantive in  
22 a change of accusation?

23 MS. FORNOS: It is not a change in accusations at all,  
24 your Honor. In fact, if we look at the original indictment,  
25 the 286 count originally combined and said that it's false



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1 claims against the government for both filing or obtaining  
2 refunds from fraudulently filed returns and adding dependents.  
3 So he was always on notice of this. It's just structurally we  
4 think it makes sense to split the two. It's different  
5 witnesses for both. It's a different type of evidence that we  
6 would present for both.

7 THE COURT: Is there anything else we need to talk  
8 about today?

9 MS. FORNOS: Yes, your Honor.

10 THE COURT: OK.

11 MS. FORNOS: One clarification on the Court's denial  
12 of the motion to suppress.

13 THE COURT: Right.

14 MS. FORNOS: We do have evidence here of the two bins  
15 and the tower computer. There was evidence by Special Agent  
16 Ragusa that he obtained consent for the iPhone and the MacBook.  
17 Those two were actually returned to Mr. Daffe, so we don't  
18 physically have them here.

19 THE COURT: OK.

20 MS. FORNOS: We do have copies of the contents of  
21 those, but the evidence did establish that Special Agent Ragusa  
22 testified that he did get consent.

23 THE COURT: It would cover those if you intended to  
24 use them.

25 MS. COHEN: Ms. Fornos and I have been working on

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1 getting copies of those items in a reviewable form to me. Just  
2 so the Court is aware, I still don't have copies of the tower  
3 in the possession of the government as of yet, but I know we  
4 are working to get formats that we can both review.

5 MS. FORNOS: Well, in fact let me just clarify, your  
6 Honor. Actually everything was provided to defense counsel,  
7 the iPhone contents were provided in DVD format. I don't  
8 believe that there's any issue with inspecting that, and a hard  
9 drive of that was indeed provided to defense counsel. So the  
10 government did make everything available. We are having some  
11 technical difficulties, whether it's a forensic image and a  
12 viewable image in native files, and I'm working with Ms. Cohen  
13 because I'm having the same issue that Ms. Cohen is having, so  
14 we are working together.

15 THE COURT: If you can't read it then the motion won't  
16 matter.

17 MS. COHEN: That would be a practical resolution of  
18 the motion.

19 MS. FORNOS: Well, your Honor, we're certainly working  
20 to try to cope, work through the technology issues. But we do  
21 represent, your Honor, that we have produced everything and  
22 made available everything. We also note for the record that  
23 the iPhone was returned to the defendant and his MacBook  
24 computer was returned to the defendant. As such, the defense  
25 is not prejudiced in my way, shape, or form by this

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1 technological delay.

2 Nothing further from the government.

3 MS. COHEN: Nothing further from the defendant, your  
4 Honor.

5 THE COURT: Very good. Thank you.

6 MS. COHEN: Thank you.

7 THE COURT: I just took a quick glance at the  
8 confidentiality order. I'm signing it now.

9 MS. FORNOS: Thank you, your Honor.

10 MS. COHEN: Thank you.

11 THE COURT: OK.

12 (Adjourned)

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